

**United States Department of Labor
Employees' Compensation Appeals Board**

GARY A. DANOWSKI, Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Palatine, IL,
Employer**

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**Docket No. 06-27
Issued: January 20, 2006**

Appearances:
Gary A. Danowski, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 3, 2005 appellant filed a timely appeal of the September 27, 2005 merit decision of the Office of Workers' Compensation Programs, which denied his claim for an employment-related traumatic injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on July 25, 2005.

FACTUAL HISTORY

On July 25, 2005 appellant, a 57-year-old electrician, filed a traumatic injury claim alleging that he slipped on the pavement that morning at 8:00 a.m. and twisted his right ankle. Appellant was reportedly in the facility parking lot when the injury occurred. He also indicated that there was oil on the pavement where he slipped. On the claim form, the employing

establishment reported that appellant's regular tour of duty began at 7:00 a.m. and he was injured when he left the building without authorization to retrieve a package of cigarettes from his car. Appellant was diagnosed with a right ankle fracture.

Robert N. Martin, an employing establishment manager, prepared a July 25, 2005 report documenting his conversations with appellant that day concerning the time and circumstances of his injury. Mr. Martin reported that he was informed at approximately 8:15 a.m. that an employee had been injured. Shortly thereafter, he reported to the supervisor's office where he found appellant filing a workers' compensation claim with his supervisor, J.D. Brown. When questioned about what happened, appellant reportedly stated that he had forgotten his cigarettes in the car and went to retrieve them and in the process, he slipped on oil in the parking lot. He also specifically identified the parking space where he was injured. Mr. Martin later went to investigate the accident scene and found very little oil stain and no marks or foot prints that would indicate someone slipping on the spot. Additionally, when Mr. Martin returned to the building he noted there was no oil tracked onto the carpet or tile area. He also commented that there did not appear to be any oil on appellant's shoes.

Mr. Martin further indicated that, when appellant returned from the doctor, the two of them walked to the parking lot to verify the location of appellant's injury. According to Mr. Martin, appellant changed his story, stating instead that he was running late and forgot his badge and when he returned to his car, he cut across the median gravel area and slipped off the curb, twisting his ankle. Mr. Martin further stated that appellant's initial version; that he left the building at 8:00 a.m. to retrieve his cigarettes, did not coincide with his official clock rings, and the second version indicated that the injury occurred prior to him clocking in for work.

Appellant's supervisor, Mr. Brown provided an August 3, 2005 statement indicating that appellant came to his office at 8:15 a.m. on July 25, 2005 and informed him that he had just injured his ankle slipping in the parking lot. According to Mr. Brown, appellant stated that the accident occurred at 8:00 a.m. when he slipped on oil in aisle 3 of the parking lot. Mr. Brown reportedly examined the soles of appellant's sneakers and noted the absence of any oil residue. He stated that he told appellant that he was going to send someone out to clean the area and appellant reportedly responded that the person would need oil socks as there was a good deal of oil. Mr. Brown also indicated that he pulled appellant's turnstile rings for the morning of July 25, 2005 and noticed there were no entries after appellant's arrival at 6:58 a.m. Lastly, Mr. Brown indicated that appellant attended the 7:00 a.m. staff meeting and had ample opportunity to inform him of the accident, but made no mention of it at that time.

The employing establishment provided a record of appellant's building access attempts on the morning of July 25, 2005. The report indicated that appellant initially accessed the building at 6:58 a.m. and he departed the building at 9:59 a.m. What the report did not reveal was appellant's alleged departure around 8:00 a.m.

On August 11, 2005 the Office advised appellant of the conflicting accounts regarding how his injury occurred and asked that he clarify what actually happened on the morning of July 25, 2005.

Appellant responded August 15, 2005, indicating that he was running late, came to the building and did not have his badge to punch in so he returned to his car to get his cigarettes and badge. On the way to the care he slipped, stepping off the curb. Appellant also stated that the empty parking spot had oil from where cars had leaked.

In a decision dated September 7, 2005, the Office denied appellant's claim because he failed to establish that he was injured in the performance of duty on July 25, 2005. The Office found that the evidence failed to establish that appellant injured himself prior to clocking in for work at 6:58 a.m. Additionally, the Office found that the record "clearly" established that appellant was injured when he left his work area for a personal matter unrelated to his job duties, specifically to retrieve cigarettes. The Office concluded that, under the circumstances, the claimed injury could not be considered as occurring in the performance of duty.

LEGAL PRECEDENT

To determine if an employee sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether "fact of injury" has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred.¹ The second component is whether the employment incident caused a personal injury.²

ANALYSIS

There is a discrepancy in the record regarding the precise time of injury and what specific activity appellant was engaged in when he injured his right ankle. Appellant initially reported that he slipped on oil in the facility parking lot at 8:00 a.m. while attempting to retrieve cigarettes from his car. He later recanted, and stated that his injury occurred in the parking lot just prior to the start of his 7:00 a.m. tour. Appellant stated that he was running late and when he reached the building he realized he did not have his badge to punch in. When he returned to his vehicle to retrieve his badge and cigarettes, he reportedly slipped stepping off the curb.

Notwithstanding the Office's finding to the contrary, the record does not support either version of events that reportedly caused appellant's right ankle fracture. The Office found that the record clearly established that appellant "left [his] work area for a personal matter ... to retrieve cigarettes." However, the only support for this version of events was appellant's initial statement, which he subsequently recanted. Furthermore, the building access records did not indicate that appellant left the facility at or around 8:00 a.m. The record does not establish that appellant was injured when he left the building to retrieve cigarettes from his car.

Appellant's initial version of the injury casts serious doubt on the veracity of his subsequent statement. Moreover, he did not provide any witness statements to substantiate his revised account that he injured himself while attempting to get his cigarettes and badge from the

¹ *Elaine Pendleton*, 40 ECAB 1143 (1989).

² *John J. Carlone*, 41 ECAB 354 (1989).

car so that he could access the building and punch in for work. It is also unclear what, if any role motor oil played in appellant's injury. In the first instance, appellant reportedly slipped on oil and in the second instance he slipped off the curb and allegedly there was oil in the empty parking spot.³ There are also questions concerning the apparent delay in reporting the alleged injury. If appellant fractured his right ankle in the facility parking lot just prior to 7:00 a.m., it is not clear why he waited more than an hour before reporting this injury to Mr. Brown at 8:15 a.m. The lack of corroborating evidence, the varying accounts and the peculiar circumstances surrounding appellant's reporting of the alleged injury raise serious doubt that he sustained an employment injury on July 25, 2005.⁴ Consequently, appellant failed to satisfy his burden of proof.

CONCLUSION

The Board finds that appellant failed to establish that he sustained an injury in the performance of duty on July 25, 2005. Furthermore, the September 7, 2005 Office decision is modified to reflect that there is insufficient evidence to establish that appellant was injured when he "left [his] work area for a personal matter ... to retrieve cigarettes."

³ Although the July 25, 2005 medical treatment records noted that appellant "tripped off curb" and "twisted [his] ankle," the report does not provide any additional details as to when or where this injury occurred.

⁴ An injury does not have to be confirmed by eyewitnesses in order to establish the fact that the employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. An employee has not met his burden of proof when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. *Delphyne L. Glover*, 51 ECAB 146, 148 (1999).

ORDER

IT IS HEREBY ORDERED THAT the September 27, 2005 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: January 20, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board